In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1724

JOHN RUSSELL KARNAP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner urges (1) that entries in his Selective Service file showing that he failed to report for his physical examination and for induction were improperly admitted because they were made in contemplation of criminal prosecution, and that, if admissible, they were insufficient to support his conviction; (2) that without proof of actual notice to him of the induction order, he could not properly be found guilty of a knowing failure to report; and (3) that the sentence imposed upon him was not "individualized."

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on two counts of failing to report as directed for his armed forces physical examination and for his induction into the armed forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to imprisonment for three years. His conviction was affirmed on appeal (Pet. App. A).

1. Petitioner's first two contentions are fully answered in the opinion of the court of appeals, on which we primarily rely. His allegations that the decision below conflicts with decisions in other circuits on various points are not well taken.

Petitioner first contends (Pet. 8) that the admission in evidence of the entries in his Selective Service file showing that he failed to report for his physical examination and for induction is inconsistent with *United States* v. *Grayson* 166 F. 2d 863 (C.A. 2). *Grayson* refused to admit as business records documents which reported information the entrant "picked up from random sources" (*id.* at 869). But Judge Learned Hand specifically recognized that the admission of such records would be proper if they recorded an event "which [the entrant] learns from a declarant who shall 'in the course of the business transmit the information for inclusion in the memorandum.' [citations omitted]" (*ibid*). That is precisely what occurred here.

Petitioner also asserts that there is a conflict in the circuits concerning the need to show that a writing admitted as a public document under 28 U.S.C. 1733 records an event to which its author could testify (Pet. 9-10). It is undisputed that the record must state matters concerning which the author has first hand knowledge. (See cases cited at Pet. 9-10.) But the court below simply held, as did the Ninth Circuit in *United States* v. *Hudson*, 6 SSLR 3009 (C.A. 9), that no independent affirmative evidence of such knowledge is necessary. In refusing to require such a showing, the court in *Hudson* correctly noted that "[s]uch a restrictive rule would virtually emasculate the purpose behind §1733 and require the proponent of the record to call witnesses for each entry where the entrant did not sign his name, state his title and make

an additional statement to the effect that 'I was there and I saw it' * * *" (*id.* at 3010).

Petitioner next contends that, even if the evidence is admissible, it may not be used as the sole evidence of the offense; he asserts that the lower courts are in conflict on this question also (Pet. 11-12). The Seventh Circuit has refused to permit a conviction "solely on the basis of unverified *and contradicted* statements contained in written memoranda." *United States* v. *Webb*, 467 F. 2d 1041, 1043 (emphasis added) (registrant reported for induction, but his version of his interviews at the induction center disagreed with the written reports in his file). Subsequently, in *United States* v. *Sorrell*, 473 F. 2d 1054, the Seventh Circuit does appear to have taken the extreme position that an uncontradicted letter stating that the registrant failed to follow the required procedures was insufficient evidence on which to convict, even when the army officer who wrote the letter testified in support of it. This was an alternative ground for reversal and would seem to impose an unrealistic burden of proof. In any event, there is not in this case any actual dispute concerning the accuracy of the record that petitioner failed to report for induction. Instead, he asserts that he did not receive notice of his obligation to report, and thus seeks to excuse, rather than to deny, his failure to report for induction.

Petitioner's fourth allegation of a conflict in the circuit courts relates to the need for actual knowledge of an obligation to report. Again, there is no conflict. The court below noted that petitioner had received a letter sent to him less than a month previously at his permanent address (his parents' house), and concluded that the trier of fact could, under the circumstances of this case, determine that the return of the induction notice marked "unclaimed" "was because of defendant's own conduct, and that the

defendant should not be allowed to complain of lack of notice" (Pet. App. 6a). This conclusion is entirely consistent with the cases cited by petitioner, which indicate that a registrant must have notice of his obligation to report, but that where the evidence showing that he received such notice is conflicting, the question whether notice was actually received is for the jury. No case indicates that a registrant may avoid the penalties for failure to report for induction by simply refusing to accept his induction notice.

2. Without discussion, the court of appeals dismissed as "without merit" petitioner's contention that he was denied individualized sentencing. This contention is based upon the sentencing judge's statement that the judges of the district had "more or less agreed" that three years would be an appropriate term, since offenders would be eligible for parole after one-third of their sentence, and this would correspond roughly with the one year of foreign duty ordinarily served by those inducted into the military service (Pet. App. 7a). It is entirely proper for the judges to confer with each other in order to achieve substantial uniformity for similar offenses. The court did not indicate that this was the only sentence which could be imposed or that this term was automatically or mechanically imposed. It was simply a guideline to afford, insofar as appropriate, equal treatment to persons convicted of substantially the same misconduct. Nothing is claimed here in the way of mitigating circumstances that would make this term unreasonable. Moreover, the basis for the guidelines is a reasonable estimate of the punishment necessary to deter the proscribed conduct. As such, the sentence is not based on vengeance or retribution, but instead on an intelligent effort to induce compliance with the statute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.